

## **REMARKS**

### **Formal Matters**

Claims 115-119 and 122-126 are pending after entry of the amendments set forth herein.

Claims 120-121 have been canceled above, without prejudice to the possibility of filing one or more continuing applications directed to the subject matter recited therein.

Claims 115-119 and 122-125 were examined. Claims 115-119 and 122-125 were rejected.

Applicants respectfully request reconsideration of the application in view of the amendments and remarks made herein.

No new matter has been added.

### **The Office Action**

#### **Claims Rejected On the Ground of Nonstatutory Obviousness-Type Double Patenting Over U.S. Patent No. 5,730,757**

In the Official Action of August 18, 2009, claims 115-119 and 122-125 were rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 42-44 of U.S. Patent No. 5,730,757. The Examiner admitted that the conflicting claims are not identical, but asserted that they are not patentably distinct from each other because the present invention and the patent both claim a method of retraction of two ribs both laterally and vertically to create a surgical space for a surgical procedure.

Applicants respectfully traverse. Claim 42 of the patent specifically recites that a displacement member is operably interconnected to the first blade and the spreader member, and that the first blade is spread relative to the second blade, while additionally the first blade is displaced in a generally vertical direction. These actions are accomplished by the spreader member and the displacement member, respectively. In contrast, the present invention claims spreading and lifting of the blade by a mechanism that is operated to move the arm members away from one another and to also move one of the first and second blades in an upward direction relative to the other, e.g., see claims 115-116.

Claim 117 recites rotating one of said first and second rib engaging blades relative to the other.

It is respectfully submitted that claims 42-44 of the patent lack any recitation or suggestion of this feature.

Claim 118 recites adjusting a support arm so that a distal end thereof contacts the outside surface of a body of a patient, prior to said driving. It is respectfully submitted that claims 42-44 of the patent lack any recitation or suggestion of this feature.

Claim 119 recites that the support arm is rotatably adjustable with respect to one of first and second arm members, wherein said first and second rib engaging blades are located at distal ends of said first and second arm members. It is respectfully submitted that claims 42-44 of the patent lack any recitation or suggestion of this feature.

Claim 122 recites, inter alia, driving said at least one rib on one side of the incision and said at least one rib on the other side of the incision apart and lifting said at least one rib under which said first rib engaging blade was inserted, relative to the at least one rib under which the second rib engaging blade was inserted. In contrast, claim 44 of the patent recites that a second displacement member displaces the second blade in a generally vertical direction opposite to the displacement of the first blade, and claim 42 recite a first displacement member that is used to perform displacing the first blade vertically relative to the second blade, in a separate action from spreading the first blade from the second blade using a spreader member.

Claim 123 recites that the driving is accomplished by a mechanism that operably connects first and second arm members, such that operation of the mechanism to move said arm members away from one another also moves said first and second rib engaging blades away from one another and moves one of said rib engaging blades in an upward direction relative to the other of the rib engaging blades. It is respectfully submitted that claims 42-44 of the patent lack any recitation or suggestion of this feature.

Claim 124 recites rotating a lever linked to a gear mechanism that drives one of said blades relative to the other of said blades. It is respectfully submitted that claims 42-44 of the patent lack any recitation or suggestion of this feature.

Claim 125 recites that adjustment of a support arm comprises rotating said support arm relative to one of said first and second blades, wherein a mechanism interconnecting said support arm and said one of said first and second blades permits rotation of said support arm relative to said one of said first and second blades in a first rotational direction, and prevents rotation of said support arm relative to said one of said first and second blades in a second rotational direction opposite to said first rotational direction. . It is respectfully submitted that claims 42-44 of the patent lack any recitation or suggestion of this feature.

In view of the above remarks, the Examiner is respectfully requested to reconsider and withdraw the rejection of claims 115-119 and 122-125 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 42-44 of U.S. Patent No. 5,730,757, as being inappropriate.

**Claims Rejected On the Ground of Nonstatutory Obviousness-Type Double Patenting Over U.S. Patent No. 5,944,736**

Claims 115-119 and 122-125 were rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 84-85 of U.S. Patent No. 5,944,736. The Examiner admitted that the conflicting claims are not identical, but asserted that they are not patentably distinct from each other because the present invention and the patent both claim a method of retraction of two ribs both laterally and vertically to create a surgical space for a surgical procedure.

Applicants respectfully traverse. Claim 84 of the patent specifically recites separate actions of transmitting a spreading force by a spreader member, and rotating the superior blade upwardly to offset the superior ribs. In contrast, the present invention claims spreading and lifting of the blade by a mechanism that is operated to move the arm members away from one another and to also move one of the first and second blades in an upward direction relative to the other, e.g., see claims 115-116.

Claim 118 recites adjusting a support arm so that a distal end thereof contacts the outside surface of a body of a patient, prior to said driving. It is respectfully submitted that claims 84-85 of the patent lack any recitation or suggestion of this feature.

Claim 119 recites that the support arm is rotatably adjustable with respect to one of first and second arm members, wherein said first and second rib engaging blades are located at distal ends of said first and second arm members. It is respectfully submitted that claims 84-85 of the patent lack any recitation or suggestion of this feature.

Claim 122 recites, inter alia, driving said at least one rib on one side of the incision and said at least one rib on the other side of the incision apart and lifting said at least one rib under which said first rib engaging blade was inserted, relative to the at least one rib under which the second rib engaging blade was inserted. In contrast, claim 85 of the patent recites that a vertical displacement member is connected to the spreader member and adjusted to offset the superior ribs once the inferior and superior blades have been separated.

Claim 123 recites that the driving is accomplished by a mechanism that operably connects first and second arm members, such that operation of the mechanism to move said arm members away from

one another also moves said first and second rib engaging blades away from one another and moves one of said rib engaging blades in an upward direction relative to the other of the rib engaging blades. It is respectfully submitted that claims 84-85 of the patent lack any recitation or suggestion of this feature, as the spreading and lifting are performed separately.

Claim 124 recites rotating a lever linked to a gear mechanism that drives one of said blades relative to the other of said blades. It is respectfully submitted that claims 84-85 of the patent lack any recitation or suggestion of this feature.

Claim 125 recites that adjustment of a support arm comprises rotating said support arm relative to one of said first and second blades, wherein a mechanism interconnecting said support arm and said one of said first and second blades permits rotation of said support arm relative to said one of said first and second blades in a first rotational direction, and prevents rotation of said support arm relative to said one of said first and second blades in a second rotational direction opposite to said first rotational direction. . It is respectfully submitted that claims 84-85 of the patent lack any recitation or suggestion of this feature.

In view of the above remarks, the Examiner is respectfully requested to reconsider and withdraw the rejection of claims 115-119 and 122-125 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 84-85 of U.S. Patent No. 5,944,736, as being inappropriate.

**Claims Rejected On the Ground of Nonstatutory Obviousness-Type Double Patenting Over U.S. Patent No. 6,602,189**

Claims 115-119 and 122-125 were rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 6-7, 9-13, 19, 21, 28, 31-32 and 38-39 of U.S. Patent No. 6,602,189. The Examiner admitted that the conflicting claims are not identical, but asserted that they are not patentably distinct from each other because the present invention and the patent both claim a method of retraction of two ribs both laterally and vertically to create a surgical space for a surgical procedure.

Although Applicants do not agree and do not acquiesce to this ground of rejection, as many features of the present claims are not recited or suggested in claims 1, 6-7, 9-13, 19, 21, 28, 31-32 and 38-39 of U.S. Patent No. 6,602,189, Applicants are nevertheless submitting a terminal disclaimer herewith to render this ground of rejection moot and to advance the prosecution of the instant application.

In view of the above remarks and the submission of the terminal disclaimer herewith, the Examiner is respectfully requested to reconsider and withdraw the rejection of claims 115-119 and 122-125 on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1, 6-7, 9-13, 19, 21, 28, 31-32 and 38-39 of U.S. Patent No. 6,602,189, as being moot.

**Claims Rejected Under 35 U.S.C. Section 102(e) (Ferrari et al.)**

Claims 115-117 were rejected under 35 U.S.C. Section 102(e) as being anticipated by Ferrari et al., U.S. Patent No. 5,875,782. The Examiner asserted that Ferrari et al. discloses a method for providing surgical access through an intercostal incision using a retractor to spread the ribs apart both laterally and vertically substantially as recited in the claims.

Applicants respectfully traverse this ground of rejection. With regard to at least claims 115 and 117, it is respectfully submitted that Ferrari et al. is not prior art with respect thereto, since the present application claims priority to Application Serial No. 08/619,903 (U.S. Patent No. 5,976,171) filed March 20, 1996, and because Application Serial No. 08/619,903 fully supports claims 115 and 117.

With regard to claim 116, it is respectfully submitted that Ferrari et al. fails to disclose a mechanism that is operated to move the arm members away from one another which also moves the blades away from one another and moves one of said blade in an upward direction relative to the other. It is respectfully submitted that the spreader mechanism of Ferrari et al. appears configured to move the arms and blades only translationally relative to one another. Although not specified by Ferrari et al., the vertical movement is likely to be achieved by tilting the entire platform. This does not constitute operating the spreader mechanism to cause movement of one blade vertically relative to the other.

Further with regard to claim 117, it is respectfully submitted that Ferrari et al. fails to disclose (or inherently perform) superiorly or inferiorly displacing and rotating one of said first and second rib engaging blades relative to the other, as Ferrari et al. appears to lack disclosure of any rotating of one blade relative to the other.

In view of the above remarks, the Examiner is respectfully requested to reconsider and withdraw the rejection of claims 115-117 under 35 U.S.C. Section 102(e) as being anticipated by Ferrari et al., U.S. Patent No. 5,875,782, as being inappropriate.

**New Claim 126**

New independent claim 126 has been submitted above. Support for claim 126 can be found, for example in claims 115-116. The Examiner is respectfully requested to indicate the allowance of claim 126 in the next Official Action.

**Conclusion**

Applicants submit that all of the claims are in condition for allowance, which action is requested. If the Examiner finds that a telephone conference would expedite the prosecution of this application, please telephone the undersigned at the number provided.

The Commissioner is hereby authorized to charge any underpayment of fees associated with this communication, including any necessary fees for extensions of time, or credit any overpayment to Deposit Account No. 50-2653, order number GUID-006CON3.

Respectfully submitted,  
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Date: November 13, 2009

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